LOS ANGELES BAR BULLETIN

In This Issue

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Los Angeles
BAR BULLETIN

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VOL. 33 AUGUST, 1958 No. 10

The President's Page

Los Angeles Bar Association a City and County Association

By E. AVERY "JUD" CRARY
President, Los Angeles Bar Association

E. Avery Crary

The Los Angeles Bar Association is a County-wide association and its eleven affiliated associations are an integral part of its life and being. With the great influx of population into Los Angeles County of recent years the affiliated groups have had great growth. However, in the local areas in which they function there are many lawyers who do not belong to either the affiliated or the Los Angeles bar associations.

Four members of our Board of Trustees represent these affiliated organizations. Each Trustee serves a two year term and representation rotates among the eleven affiliated associations. Currently Long Beach, Whittier, Santa Monica, and San Fernando Valley have members on the Board.

There is now being drafted a proposed amendment to the by-laws of the Association which will be submitted to the membership at the annual meeting in November, providing in substance that when an affiliated association reaches a given size in membership

with a to-be-specified percent of affiliated members in the Los Angeles Bar Association, it shall have a permanent member on the Board of Trustees of the Los Angeles association.

This year your Board of Trustees appointed a committee under the chairmanship of Henry Melby, Glendale, on which each of the affiliated associations is represented for the purpose of "Coordinating Activities of the Affiliated and Los Angeles Bar Associations." It is our hope and desire that through this committee the affiliated groups will have a better opportunity to express their unified suggestions and requests for consideration and action by the Board of Trustees of the Los Angeles Bar Association. However, this does not mean that an affiliated association must speak through this committee. We solicit and welcome the views and suggestions of any affiliate by direct approach, but the committee will provide a forum for the exchange of ideas and will afford a means of closer coordination and understanding.

Issue Editor—John Joseph Hall

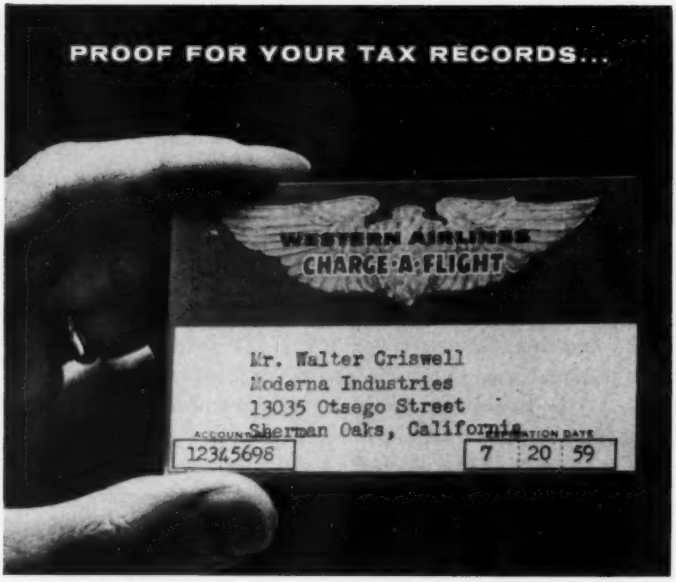
The dues of an affiliated member (whose office is nine miles or more from the Los Angeles City Hall) is $10.00 per year. He enjoys the same privileges as the members paying $20.00 per year whose office is within the nine-mile radius.

We welcome affiliated members and believe that the Los Angeles Bar Association has much to offer them. Some of the advantages of belonging to the Los Angeles Bar Association either as an active or an affiliated member include such things as group insurance. Our Accident and Sickness Insurance Plan with the National Casualty Company has been in effect for twelve years, and currently there are 1747 members participating. Our new Life Insurance Plan with Northwestern National Life Insurance Company, which qualified this past July 1st, already has over 1,000 members participating. The regular monthly meetings of the Association and the monthly meetings of the Taxation Committee are open to any member. The Junior Barristers also hold regular monthly meetings along with many other get-togethers for both professional growth and pleasure. Each member receives the Bar Bulletin published monthly which contains "bread and butter" articles on timely subjects, including "Tax Reminders."

There are 32 standing committees in the Association and many special committees are appointed from time to time. These committees have made an outstanding contribution to the legal profession and the public and their members can justly be proud of their accomplishments.

Last month a dinner meeting was attended by the presidents of affiliated associations and the members of your Board of Trustees. It was not only a very pleasant opportunity for the Trustees to become better acquainted with the heads of the affiliated associations, but the event was devoted to discussions, profitable I am sure, to all in attendance. We are looking forward to more of these meetings, which it was the consensus should be held quarterly.

Beginning with this issue of the Bulletin, a special section will be devoted to the affiliated associations. This month you will find their officers listed. It is hoped that this section will be filled with contributions from affiliated associations which will be of keen interest to all readers of the Bulletin.



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WESTERN AIRLINES

Progress Report:

Personal Injury Nonjury Panel

By JUDGE CLYDE C. TRIPLETT
Los Angeles Superior Court

As "attending physician" this might be termed a progress report and prognosis on the condition of PINJ, lusty Los Angeles County infant which holds the promise of coping with our everincreasing load of personal injury and wrongful death litigation.

We are told that each month about 40,000 people move to California from other states and that roughly one-half locate in Los Angeles County. Most of these people drive automobiles, and more automobiles mean more lawsuits. The utter impossibility of keeping abreast with this type of litigation on a "doing business as usual" basis is well known to every judge and to every lawyer in this county.

The nation-wide 1957 average time lag for personal injury cases reaching jury trial in counties of over 750,000 population is slightly over 24 months, with the range running from 9 months to 54 months. The time lag in the Los Angeles County Superior Court is hovering around 15 months which, while considered favorable in comparison with other major population centers, nevertheless causes real concern and distress to the local bench and bar. The problem is particularly grave when one considers that the backlog of untried civil cases in the Civic Center Departments of this county has mounted from around 10,500 a year ago to in excess of 14,000 at the present time. Civil filings in the Civic Center Departments jumped from approximately 18,000 in 1956 to 21,000 in 1957, and the increase for the first six months of 1958 has even exceeded the increase for the corresponding period of 1957. It is small wonder the time lag has jumped from approximately one year to its present 15 months.

In an all-out effort to cope with the problem, Presiding Judge Louis H. Burke of the Los Angeles Superior Court established a new procedure designed to substantially reduce the trial time and, incidentally, the expense of personal injury litigation. We are told

the experiment is being carefully watched in other metropolitan jurisdictions beset by similar problems. When asked to appraise the success of the program, now that we have had the experience of several months of operation, Judge Burke assigned the task to the writer who as Judge of the Master Calendar Civil Department for the Civic Center Courts has attended its day by day administration.

The new program recognizes the reluctance on the part of counsel to waive the right to trial by jury until a case is assigned for trial in a specific department. Experience has shown that after a case is assigned for trial, the mere fact that one side may then announce its willingness to waive jury in that department often induces a reluctance on the other side to join in such a waiver. The net result has been that in most personal injury cases jury trial is demanded by one side or the other, or by both. The new program recognizes the fact that the individual trial attorney by reason of his own past experience may be reluctant to try cases without a jury in certain departments. While other attorneys in the personal injury field may agree with respect to the waiving of juries before a certain judge, the individual attorney, by reason of his own experience in that department, may have a contrary view.

Judge Burke surmised that lawyers might be willing to stipulate

that jury trial be waived if their cases were assigned for trial by one of 10 judges appointed to a special personal injury nonjury panel (PINJ), provided that at the time of the actual assignment each side be given the right to note one exception to the proposed assignment. Upon such exception being noted, the case would be assigned to one of the other judges on the panel. This exception would be in no sense a "challenge" of the judge, and no affidavit or statement of reasons would be required and no record would be kept of such exception. The matter would be entirely confidential between the attorneys in the particular case and the Master Calendar Judge. The courtesy of permitting the attorneys on each side to voice an exception to a proposed assignment to a judge on the panel would be in recognition of the efforts of counsel to cooperate with the Court in expediting the trial of these matters.

With the encouragement of many plaintiff and defense counsel with whom the program was discussed and with the approval of the Advisory Committee of the Court, the plan was placed in operation on April 21, 1958.

Jury waivers are solicited in consideration of assignment of cases to the panel at the time of pretrial. A form of written stipulation is provided for use of the attorneys at the pretrial hearing and when there signed all jury fees are ordered refunded. Jury fees are also refunded if jury waivers in consideration of assignment to the panel are made at any time after the pre-trial hearing but before the daily jury panels are actually ordered. Even if the waiver be at the time the case is assigned out for trial, jury fees on deposit will be refunded if the jury panels ordered for that particular day can be utilized for other cases so that no financial loss is sustained by the county.

If the party who has demanded a jury trial and deposited jury fees waives a jury in the Master Calendar Department in consideration of assignment to the panel, opposing counsel not wishing to join in the stipulation must deposit the jury fees either at that time or prior to the date to which the case may be continued, should he desire such continuance.

When the panel judges are not engaged in trying cases assigned to them under this plan, their time is occupied in the trial of other types of cases, usually short matters, to assure their maximum availability for the trial of panel cases.

While the saving of court time is the primary objective, members

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of the bar recognize that for every court day saved there is also a day of attorney's time for at least two lawyers, with consequent economy in the overall expense of litigation.

The judges realize this plan is an experiment and its success or failure will depend upon whether the plan is acceptable and meritorious from the viewpoint of attorneys and litigants. Apparently it is meeting with increasing favor from members of the bar. A day seldom passes when there is not at least one case assigned to PINJ and sometimes as many as four. During the month of June there were 20 court days and 30 cases were transferred from the Master Calendar Department to Panel Judges. Two were settled en route to the trial departments and 28 were disposed of by trial judges. Conservatively, this means that during the month of June this plan saved not less than 56 court days, which was the equivalent of adding approximately 2-½ judges to the civil pool. This because the average trial time for a personal injury case is 3-½ days if tried with jury and one day if tried without jury.

It is impossible to estimate the fringe benefits which necessarily follow. So far as I now know, there has been no appeal filed in any such case tried by a Panel Judge. That means no retrials after reversals. Also there have been no mistrials declared, and that means no retrials after a hung jury, or mistrial before submission to the jury. Likewise, to my knowledge, there have been no new trials granted in any of these cases, and that means no second trial after a motion for a new trial. Naturally, there will be exceptions as time goes on but the percentage will be small.

It is also impossible to estimate the saving in attorneys' time, both in preparation for trial and during trial. Ordinarily it requires less time to prepare a case for trial before a judge than to prepare it for trial before a jury. It would appear that in cases where compensation of plaintiffs' attorneys is contingent the actual gamble of lawyers' time is reduced by more than two-thirds.

When a case is called in the Master Calendar Department in which the attorneys have stipulated, or at that time offer to stipulate, it is the practice of the Master Calendar Judge to have the attorneys approach the bench immediately. He then states the name of the first available Panel Judge. If no exception is noted the case is forthwith assigned. If either side exercises the right to note an exception then the judge states the name of the second available Panel Judge. If the attorney who has reserved his right of exception

desires to exercise it, the case is then assigned to the third available Panel Judge. No record is made in the minutes or in the file of the exercise of any such exception, and counsel should not be reluctant nor embarrassed in any way in respect thereto. Attorneys should feel free to exercise, or not exercise, the privilege of exception as the interests of their clients may dictate. As a practical matter there are very few exceptions stated. In the last 24 cases assigned only three were declared.

My recollection of the challenges actually made during the past several months indicates that they are well scattered throughout the panel and have not been centered against only one or two judges. This would appear to justify our original thinking that irrespective of how lawyers generally may feel about a particular judge, the individual attorney because of his own batting average may not share the general view.

In many cases the attorney on one side offers to stipulate but the attorney on the other side refuses. There seems to be no definite trend as between attorneys for the plaintiff and attorneys for the defendant. In other words, approximately the same number of plaintiffs' attorneys on the one hand and defendants' attorneys on the other hand have refused to stipulate. There is no disposition nor attempt by the court to force or induce attorneys to waive trial by jury. As previously stated the ultimate success or failure of the plan will depend upon its own merit and its desirability from the attorneys' point of view. Present indications are that it will be a success and will become a permanent institution or policy in our Civic Center Courts. If so, it will make a substantial contribution toward saving the time of the courts and of attorneys. Perhaps it will prove a partial solution to the problem which confronts us. Unless the courts and the lawyers can themselves devise a solution, some day the people acting through the Legislature will make the attempt and such an attempt may ultimately and seriously affect the private practice of law as we now know it.

The Avoidable Decision

By WILLIAM J. PALMER
Judge of the Superior Court of California
in and for the County of Los Angeles

Unlike counterfeit money, counterfeit logic and counterfeit law may originate in innocence; indeed, even in active sympathy or in the idealistic purpose of promoting human welfare through redesigning the law. The effects, however, are very similar whether the counterfeiting is done from wily design, from innocent illusion, or from a disorientation to reality wrought by persuasive, but specious, argument, or whether the counterfeiting skill is practiced in one field of human affairs or another. We may seriously question which has the greater potentiality of injury to a society, counterfeit money or counterfeit law. In either case, the duty of exposure is the same.

II.

We could not imagine a mind well trained and disciplined in the law, but let us imagine someone, advancing the following thesis:

"The plea of 'not guilty' in a criminal case embraces all possible defenses, except, by special statute, the defense of not guilty by reason of insanity. Hence, matters such as the following should not be permitted to enter a criminal trial by way of plea or jury instruction: alibi; entrapment; absence of specific intent; absence of any criminal intent; intoxication as related to specific intent; unconsciousness; self-defense.

"Reference to any such matter of detail is unnecessary in the face of defendant's plea of not guilty. That broad plea covers all possible exculpatory theories and facts. To instruct a jury on any of the mentioned specific theories of defense emphasizes the defense unduly; and instructing a jury on any such subject is confusing."

No lawyer in good health would take such a proposal seriously, even if we could convince him that anyone really and seriously had advanced it. The possibility of so convincing him would be extremely slight. One does not have to be an experienced trial lawyer, public speaker, forensic writer, salesman, psychologist or propagandist to know the significant difference between a person's saying only that he is not guilty, and his supplementing those words by saying why he is not guilty or why the trier or audience should believe that he is not guilty. And no enlightened mind would deny to

a person charged with wrongdoing the right to supplement a bare denial with supporting facts, claims, theories or reasons.

III

Following an automobile accident, the involved person whom destiny has marked to be the defendant in an action for damages can sincerely believe and state any one of four possibilities as to the cause of the accident:

(1) The most magnanimous expression he can make is the following or one of similar import:

> "I realize that I was negligent and that I alone was the cause of the accident."

(2) The next-to-the-most liberal concession that he can make may be expressed in words such as the following or words carrying like import:

> "It is my sincere belief that neither Jones (the other driver) nor I was negligent. So far as our conduct was concerned, the accident, in my opinion, was unavoidable."

(3) He sincerely can believe and state that he was negligent, but that Jones, too, was negligent, and that the accident was proximately caused by the concurring negligence of both.

(4) Finally, he can believe and state that he was not negligent or that no negligence on his part was a proximate cause of the accident, and that the accident was caused solely by the negligence of Jones.

It is clear that no two of these positions are alike. No two will make the same impact upon the listening mind. And if in this land where we boast of freedom of thought, and where no one would dare confess to deliberately attempting legislative or judicial thought control, a man has a right to entertain any one of the four beliefs, he certainly has the same legal right to entertain any of the others and the same ethical right to do so if he truly so believes. It would be astonishing beyond the possibility of emphasis or exaggeration for an American court to deny that right to any person, but the Supreme Court of California has gained the dubious distinction of presuming to do that very thing.

IV

In Butigan v. Yellow Cab Company, 49 Cal. 2d 652 (January 28, 1958), four members of the court joined in a decision, the effect of which is court-made law that a trial judge commits reversible

error if he defines for a jury the legal meaning of the term "unavoidable accident," i.e., an accident of which no negligence attributable to a party to the action is a proximate cause.

Not content with that bizzare dictation, the court stated: "In reality, the so-called defense of unavoidable accident has no legitimate place in our pleading." (p. 658.)

If that statement is anything more than a thoughtless, academic dictum, to be ignored by seasoned and thinking advocates and jurists, it is a pronouncement to this effect: To plead that an accident was not caused by negligence of either plaintiff or defendant, even if the pleading be true, is to plead an irrelevant or redundant proposition, which must be stricken on motion. When the defendant is charged with negligence and the plaintiff with contributory negligence, an alternate plea that neither one was negligent, and hence that the accident was unavoidable as to them, is, the Supreme Court states, irrelevant and unlawful. And it is so, even though a plaintiff is always helped, not injured, when defendant reveals in his answer the theories he intends to pursue at the trial.

V

When we critically examine the opinion in search of reason for these strange pronouncements, we find nothing more than a superficial, attempted justification which falls short of being even specious. It bears these five facets:

(1) A fragmentary reference to history (p. 658), which is meaningless. If the question were whether or not eight and seven add up to fifteen, the answer could be obtained by demonstration, and only a person fearful of that demonstration would attempt to evade it by directing our attention to the history of numbers. When the question is whether or not a person charged with wrongdoing has a right to plead what he believes to be true about the incident in question, if we are incapable of readily finding the answer in deep-seated juristic, religious, philosophical and political concepts, then we are incapable of finding it in any fragment of or in all the history of human thought.

(2) The Court proffers this statement which, ordinarily, would be true (assuming that, as a matter of law, the defendant was negligent):

> ". . . the defendant under a general denial may show any circumstance which militates against his negligence or its causal effect." (p. 658.)

Under our sensible rules of pleading, this is not a valid argument in any event. The kindest words we can say of it is that it is academic. If one were sued for money, the simple plea, "I don't owe plaintiff any money," would be broad enough to embrace all possible defenses, but to forbid, for that reason, any specification of defensive facts or theories would be irrational. We go to great lengths in our provisions for discovery,, depositions, inspections, pre-trial, etc., to enable plaintiff to obtain the specifications and details of the defense. Manifestly, it does not make sense to forbid specification in an answer simply because a general denial covers every possibility of defense.

But this argument of the Court is hollow for a more significant and compelling reason: When a trial judge grants a motion to strike from a pleading certain allegations, he thereby rules that evidence of the truth of those allegations is inadmissible. Thus if it is in accord with the law to say that the pleading of the defense of unavoidable accident must be stricken from an answer on motion, then it clearly is incorrect to say that the defendant, thereafter and nevertheless, may offer evidence to prove that the accident was unavoidable.

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In other words, if it be true, as the Supreme Court says, that the defense of unavoidable accident "has no legitimate place in our pleading," then it is both false and logically absurd to say, as the Court does, that "the defendant under a general denial may show any circumstance which militates against his negligence or its casual effect."

(3) The Supreme Court states that "the instruction on unavoidable accident serves no useful purpose." The truth is that no competent trial judge gives the instruction on unavoidable accident unless giving it either is necessary or does serve a useful purpose. What makes the instruction necessary is the fact that the term "unavoidable accident" has been used in the trial. An advocate has exercised his inalienable right of telling, and his clear duty to tell, the jury what he believes to be true about the episode in question. In doing so, he has spoken of an "unavoidable accident." Because the legal meaning of that term is so significantly different from its ordinary meaning to the layman, to define the term for the jury becomes the imperative duty of the trial judge. Appellate judges many times have criticized trial judges for not defining terms used before the jury, with the legal meaning of which the jurors could not be expected to be familiar.

Reason, of course, exists in the proposition that when the evidence, as a matter of law, shows that the accident in question was the proximate result of negligence on the part of one or more parties to the action, no instruction on unavoidable accident should be given; but even in such a situation, if the term "unavoidable accident" was used in opening statement or argument to the jury, the better practice is for the judge, rather than ignore the matter, either after or without telling the jury the legal meaning of the term, to clearly instruct that, as a matter of law, the accident in question was not unavoidable. If such is his decision, he should state it, not hide it.

(4) As a further reason for its strange edict, the Court hints that to define for the jury the term "unavoidable accident" is to "overemphasize" the defense. (p. 659.) This is an apt example of those propositions so ridiculous and so self-exposed in their fallacy as to make answering them difficult. Assuming that anyone may need assistance in seeing the fallacy, the best way, I think, to render that assistance is to state the proposition with greater precision. This is what it says: "After the defendant has pleaded that no negligence on his part was a proximate cause of the accident, he unfairly,

and unlawfully overemphasizes his defense if he also pleads that the plaintiff, too, was free of negligence proximately causing the accident"!

When we are considering the legality or propriety of a defensive plea, we must recognize the possibility that the plea may be true. It is a radically new concept in jurisprudence that a person accused of wrongdoing shall not be permitted to plead the truth because doing so would overemphasize his defense.

(5) The final argument of the Court is that any instruction defining the term "unavoidable accident" is confusing! (p. 660.) It is possible, of course, for any jury instruction to be so drafted as to be confusing. It is possible even for an instruction that states the law with perfect accuracy to be confusing. Indeed, it is impossible to state some law accurately without creating confusion, because the law itself is confusing. But if it be confusing to tell the jury the simple fact that the term "unavoidable accident" means, in the law, an accident not proximately caused by negligence of either plaintiff or defendant, then we of the legal profession no longer can justify ourselves in not making every reasonable effort to abolish the jury system. But we only need think of any of numerous instructions frequently given to juries and uniformly approved by appellate courts to know that this argument about confusion is, itself, whether or not so intended, a device for confusion, utterly devoid of any sustaining legal principle. Consider, for example, the instructions on entrapment or on insanity given in criminal cases, or consider any instruction that anyone can draft and truly state therein the law concerning intervening agencies and proximate causation, or the law on the subject of liability of public emergency vehicles.

As every competent and ethical lawyer knows, the paramount duty behind a jury instruction is to truthfully state the law whether it is simple or complex. If the achievement of that purpose is confusing to a jury, so it must be in a land where judges have no authority to change the law to make it simple to themselves or, in imagined necessity, to a jury, and where they violate their oath in attempting to do so.

TAX REMINDER

By EDWARD SUMNER

APPLICATION OF CALIFORNIA TAXING STATUTES TO FOREIGN CORPORATIONS SELLING MERCHANDISE TO CALIFORNIA CUSTOMERS

Section 6203 of the California Sales and Use Tax Law, as amended in 1957, includes in the definition of retailers engaged in business in California foreign corporations which have representatives, agents, salesmen, canvassers, or solicitors operating in this State under the authority of the foreign corporation for the purpose of selling, dealing in, or taking orders for tangible personal property. Accordingly, such foreign corporations, when they deliver tangible personal property to consumers in California, are required to comply with the use tax provisions of the Sales and Use Tax Law by registering with the Board of Equalization, collecting and remitting the use tax, and filing appropriate returns. Compliance with the taxing statute is required even though a foreign corporation does not have a place of business here and is not qualified to do business here. The foreign corporation's representatives, agents, salesmen, canvassers, or solicitors must, however, be operating under the authority of the foreign corporation or a subsidiary.

The constitutionality of State taxing provisions requiring a foreign corporation having only solicitors, etc., in another state to collect and remit a use tax imposed by that state and otherwise comply with reasonable registration and reporting requirements has been upheld by the United States Supreme Court and it must be concluded that the California provisions are immune to attack on those grounds. See *General Trading Company vs. State Taxing Commission,* 322 U. S. 335, 88 L. Ed. 1309, 64 S. Ct. 1028; *Miller Bros. Company vs. Maryland,* 347 U. S. 340, 98 L. Ed. 744, 74 S. Ct. 535; and also *Topps Garment Corporation vs. State of Maryland,* 212 Md. 23, 128 Atl. 2d 595.

The fact that a foreign corporation which is not qualified to do business here and maintains no stock of goods is deemed to be engaged in business here for California Sales and Use Tax Law purposes does not establish that the corporation is engaged in business here within the purview of the franchise tax provisions of the California Bank and Corporation Tax Law. To the contrary, a

foreign corporation which maintains no stock of goods and engages in no activities in California, other than shipping goods to customers here pursuant to orders taken by agents operating here, is for Bank and Corporation Tax Law purposes deemed to be engaged in interstate commerce and not subject to the California franchise tax for the privilege of exercising a corporate franchise here.

The non-applicability of the franchise tax provisions to a foreign corporation which does nothing here beyond shipping goods to customers pursuant to orders taken by California agents does, of course, not indicate that no tax and returns are due under the Bank and Corporation Tax Law. Such corporations are, in fact subject to the income tax imposed on foreign corporations who derive income from California sources.

A foreign corporation which merely ships goods to California customers from outside the State and which maintains no stock of goods here, is not qualified to do business here, and has no agents, canvassers, or solicitors, etc., here, is not subject to either the Sales and Use Tax Law or the Bank and Corporation Tax Law. The fact that orders for a foreign corporation's merchandise are mailed, telephoned, or telegraphed to the foreign corporation's office outside of the State by California customers, or by independent contractors not subject to the foreign corporation's direct authority, will not subject the foreign corporation to California use tax or corporation income tax liability.

NAMES OF PERSONS SERVING ON FEDERAL COURTS CRIMINAL INDIGENT DEFENSE PANEL FOR JULY, 1958

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Robert Feinerman
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Ronald R. Silverton
Harwood A. Stearns
Robert S. Thompson
Barbara Warner
Carl Yanow
Marvin Zinman

American Bar Association Annual Meeting

Twenty-three persons, firms and corporations, engaged in "related businesses" contributed to the fund raised by the Host Committee organized to make arrangements for the convention of the American Bar Association. Solicitation was limited to one form letter sent out by a sub-committee of the Budget and Finance Committee. The contributors and the "related businesses" in which they are engaged are as follows:

Title Insurance and Trust Company, Title Insurance
Harris and Harris, Examiners of Questioned Documents
William N. Curran, Judicial Surety Bonds
Jeffries Banknote Co., Printers
National Casualty Co., Casualty Insurance
Van Nuys Building, Office Building
The Biltmore Hotel, Hotel
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Bekins Van and Storage Co., Record Storage
The Brief Shop, Printing
Vernon L. Polk & Associates, Stenographic Reporting Service
Clark Sellers and David A. Black, Examiners of Questioned Documents
Metropolitan News, Legal Advertising
Lawyers Title Guaranty Co., Escrow Service
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The Los Angeles Daily Journal, Legal Advertising
Fidelity & Deposit Company of Maryland, Judicial Surety Bonds
The Corporation Trust Co., Corporation Service
Truesdail Laboratories, Inc., Technical Evidence
Beeson Agency, Personnel Service
Mayfair Hotel, Hotel

Opinion of Committee on Legal Ethics Los Angeles Bar Association

Opinion No. 245

(October 17, 1957)

REPRESENTATION OF INDIGENT BY COURT APPOINTMENT—PROPRIETY OF ACCEPTANCE OF FEE.

The Committee has received two recent inquiries with respect to the ethical considerations involved in the acceptance by an attorney, selected by Court appointment, of a fee for services rendered to an indigent prisoner. Both inquiries bear upon the same problem and may therefore be answered in a single opinion.

The facts of the two cases are as follows:

Case 1:

A federal district judge appointed a local attorney to represent in a criminal case a man whose mental condition did not at the time permit a full inquiry into his ability to pay for legal services. The appointment was made to a member of the Los Angeles Bar Association Federal Indigent Defense Committee. The case has been pending for about a year and a half and as activities have occurred, the local attorney has kept the parents of his client advised of the progress of the case. The defendant's parents in turn have notified the attorney that they were able to pay reasonable attorneys' fees, but thus far the local attorney has refused to accept such proffered fees. In the course of the case, the local attorney was notified by a New York attorney that the latter had been retained to represent the defendant but that he desired to work in association with the local attorney. The New York attorney has continually insisted that the local attorney charge a fee for his work, particularly since the parents of the prisoner are well able and apparently completely willing to pay for the local attorney's services. The federal judge who appointed the local attorney has been notified of these facts and has stated that he would have no objection to the local attorney accepting a fee, provided that this Committee is of the opinion that no breach of ethics is involved.

Case 2:

A local attorney who was present in the United States District Court during the calling of the criminal calendar was requested by the judge to represent a prisoner who stated that he had no funds with which to employ an attorney. The

attorney accepted the employment and tried the case which eventuated in a hung jury. The case is reset for further proceedings in several weeks. Meanwhile, the sister of the prisoner has written to the attorney stating that if there is any fee for services to let her know. These facts were brought to the attention of the federal judge in whose court the case was tried. The judge has indicated that the propriety of collecting a fee under the foregoing circumstances should be determined by this Committee.

Opinion:

Neither the Canons of Professional Ethics of the American Bar Association nor the Rules of Professional Conduct in California take any specific cognizance of the matters now presented to this Committee. There is nothing in the federal statutes or rules of court which has any direct relevance. The questions therefore appear to be answerable by reference to and application of the general principles of honor, integrity and devotion to duty which underlie all conduct of an attorney. (ABA Canons 29, 32.)

Rule 44 of the Federal Rules of Criminal Procedure requires the court to appoint counsel for one who desires counsel but is unable to afford counsel of his own selection. The attorney's duty to the indigent prisoner is the same as to any client. (ABA Canon 4.) There is nothing said in the Criminal Rules or in any federal statute about payment of the attorney's fee. Accordingly, the United States may not pay such fee (*Nab v. United States,* 1864, 1 Ct. Cl. 173; cf. Cal. Penal Code, Sec. 987a). The courts, however, have indicated that where counsel is appointed to represent one who is or purports to be an indigent, the attorney is entitled to collect a reasonable fee if the client then or later proves to have the requisite financial ability (*Row v. Yuba County,* 17 Cal. 61; 6 Cal. Jr. 2d 385).

In harmony with both the foregoing view of the courts as well as with the policy considerations supporting the duty of an attorney to render his services to indigents without compensation (See: *Hill v. Superior Ct.,* 46 Cal. 2d 169, 172), Legal Ethics Committees in other jurisdictions have taken the position that an attorney appointed by the court may, with the court's approval, accept a fee or gift from the relatives of his client, but such fee or gift must be suggested in the first instance by the relatives or the client. The attorney may not demand a fee, directly or indirectly (Drinker, Legal Ethics, P. 62).

We agree with the opinions just mentioned. Accordingly, it is the opinion of this Committee that the attorney in Case 1 may properly accept a reasonable fee from his client's parents. In Case 2, however, the facts indicate that the client's sister is not suggesting that she pay a fee for her brother but is only inquiring as to whether the attorney intends to charge a fee. In the opinion of the Committee, the attorney in Case 2 should not make any charge for his services.

This opinion, like all opinions of this Committee, is advisory only (By-laws, Art. x, Sec. 3).

Affiliated Bar Associations

Many of the members of the Los Angeles Bar Association practice in outlying communities where they also take an active part in the work of local bar associations affiliated with ours. A list of the affiliated associations and their current officers follows:

Beverly Hills Bar Association

Lee Combs, President
Lester W. Roth, Vice President
Louis M. Brown, Treasurer
Robert A. Neeb, Jr., Secretary

Glendale Bar Association

Richard E. Saulque, President
Bruce A. Randall, First Vice President
George F. Flewelling, Second Vice President
W. Montgomery Jones, Secretary-Treasurer

Inglewood District Bar Association

Merton A. Albee, President
Enrico J. Verga, 1st Vice President
E. O. Berry, 2nd Vice President
John A. Michael, Treasurer

Long Beach Bar Association

Moses E. Lewis, Jr., President
Thomas F. McCarry, 1st Vice President
Edison J. Demler, 2nd Vice President
Lynn D. Compton, Secretary-Treasurer

Pasadena Bar Association

Glenn H. Cutler, President
Harry M. Bowman, 1st Vice President
Kenneth A. Millard, 2nd Vice President
Andrew R. Edwards, Treasurer
Richard W. Olson, Secretary

Pomona Valley Bar Association

Morgan W. Lowery, President
Houston A. Snidow, 1st Vice President
George E. Pike, 2nd Vice President
John B. Selters, Jr., Secretary-Treasurer

San Fernando Valley Bar Association

Richard R. Rogan, President
Alvin H. Warnberg, Vice President
Frank Fishkin, Secretary
Jack Swink, Treasurer

San Gabriel Valley Bar Association

James A. Montpas, President
Albert A. Adam, Vice President
Stanley Weinstein, Treasurer
Walter T. Shatford, Secretary

Santa Monica Bay District Bar Association

James J. McCarthy, President
George A. Forde, Vice President
Arthur K. Marshall, Secretary-Treasurer

Southeast District Bar Association

Elwayne E. Smith, President
Deryl D. Shumway, Vice President
Frank J. Galeotti, Secretary
Richard C. Cumming, Treasurer

Whittier Bar Association

G. Scott Miller, President
Josephine K. Starkey, 1st Vice President
Wayne Thompson, 2nd Vice President
Herbert J. Adden, Jr., Treasurer
Patricia J. Hofstetter, Secretary

Brothers-In-Law

By George Harnagel, Jr.

George Harnagel, Jr.

The **Washington** State Bar Association is vigorously campaigning against the extension of the state sales tax to professional services, including legal services, and is receiving the cooperation of the state medical and dental associations. Such an extension of the tax was narrowly avoided in the closing days of the 1957 Washington State Legislature and it is anticipated that efforts to extend it will be aggressively presented to the 1959 session.

* * *

"Figures brought to the attention of the U. S. Senate recently showed that while six Federal agencies issued loans of at least $35,000,000 in a three-year period beginning in 1955, mostly to encourage building poultry houses, a seventh agency was spending approximately $12,000,000 a year to buy up surplus eggs."—*P. G. and E. Progress.*

Presumably this should be indexed under Eggspert Planning or possibly the Taxpayers' Yolk.

* * *

"In the last analysis, it is not as important that causes are decided with a minimum of judicial bother as it is that they are decided right. We must not forget the admonition of Jefferson that delay is preferable to injustice. We should appropriately balance this idea against the other truth that justice delayed may be justice denied."—A. Sherman Christenson, Judge of the United States District Court for the District of Utah.

* * *

"Sixty Different Succession Laws in Illinois" is the eye-catching title of an article by Professor Allison Dunham of Chicago University School of Law in a recent issue of *Illinois Bar Journal* He counts the rules of intestate succession found in the Illinois Probate Act (comparable to our Probate Code) as only one of

the sixty. He then finds 40 *other* Illinois statutes establishing diverse formulae for distribution of property or for payments made to next of kin after death and *over 20* federal statutes doing the same thing. The latter, of course, are applicable to deceased residents of other states as well.

Many of the state statutes apply to the refunds of contributions made to retirement plans by various county, state, municipal and special district employees and the variety of the distribution formulae seems endless. The same is true of state acts providing for the payment of various death benefits. Some of the federal statutes touch in various ways benefits, allowances, etc., payable on the death of federal employees from judges to lighthouse keepers. A whole complex of statutory provisions apply to deceased members of the armed forces and to veterans. Some lesser known statutes apply to farmers' benefits such as parity payments, soil conservation payments, crop insurance and the like. Other federal statutes apply to the widows and children of inventors, copyright proprietors, sailors and longshoremen.

* * *

"Reform of procedure is always a ticklish business for we grow accustomed to paths we have long trodden however tortuous. But the task must be undertaken from time to time if the vehicle of the law is to keep pace with the changing requirements of the age."—MacMillan, *Law and Other Things,* page 35.

* * *

Cross-Examination of an Expert Witness

Q. After you made your appraisal of this property why did you consult with three other appraisers? A. Just to confirm my judgment as to the value.

Q. Didn't you trust your own judgment? A. Yes, sir.

Q. Then why did you consult the three others? A. I don't know —unless it's for the same reason you have three other lawyers at the table with you there.—*The National Shorthand Reporter.*

* * *

Illinois has 2,925 justices of the peace. Seven-eighths of them hear less than 25 cases a year.

* * *

Things I didn't know until I found out:

That our colloquialism, "the clink", is derived from the Clink, a prison in Southwark, England, which goes back to Elizabethan times if not beyond.

Witness for the Prosecution

Back in 1916 Universal Oil Products Company brought a suit against Standard Oil Company of Indiana charging infringement of a patent covering the Dubbs process for cracking gasoline. It was settled out of court in 1931, but not until after thousands of pages of testimony had been taken over the intervening fifteen years. The plaintiff's director of research, Dr. Gustav Egloff (known less formally as "Gasoline Gus") did his share to contribute to an incredibly long record. His durability as a witness evoked the following editorial comment in the February 16, 1928, issue of the St. Louis *Post-Dispatch*:

> "We are lost in admiration of Doctor Egloff, oil expert of the Universal Oil Products Company of Chicago. In the dim, dead days of last November, he took the witness stand in a suit of his company against the Standard Oil Company . . . [and] is still on the stand and still talking. The workaday world has saluted the Armistice colors, waxed fat on Thanksgiving turkey, dressed a Christmas tree, observed the New Year's saturnalia, and paid court to its lady love on the day of St. Valentine—and Doctor Egloff is still testifying. How does he do it? Well, one day an unwary attorney asked him to define *emulsion*. Snapping into the subject, Doctor Egloff answered him in seven calendar days of four hours each . . . We repeat we admire him, but—remembering the seven-day answer to the emulsion question—we would never be so incautious, especially if we were in a hurry, to ask him what time it is."